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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 509

AMBASSADOR HOTEL COMPANY OF LOS ANGELES,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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COMMISSIONER OF INTERNAL REVENUE,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner petitions that the writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered in the above case, reported in 280 F.(2d) 293 (App. p. 16), on June 10, 1960, affirming a decision of the Tax Court published in 32 TC 208. (R. p. 39). Rehearing was denied August 1, 1960. (App. p. 26). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), 62 Stat. 928.

QUESTION PRESENTED

Has the Tax Court of the United States jurisdiction to allow a refund? If so, does the mere order of the Tax Court determining an overpayment *ipso facto* constitute the allowance of a refund?

STATUTES INVOLVED

Section 3807 (26 U.S.C. 1952 edition) is set forth in the appendix at page 13. The crucial words thereof are:

> "If *under a determination* in respect of a tax imposed by Chapter 1 or Chapter 2 a deficiency is assessed or *a credit or refund of an overpayment is allowed.*" (Italics ours)

Section 6407 (26 U.S.C.) reads:

> "The date on which the Secretary or his delegate first authorizes the scheduling of any overassessment in respect of any internal revenue tax shall be considered the date of the allowance of the refund or credit in respect of such tax."

STATEMENT OF THE CASE.

This case involves a deficiency of $33,290.61 in federal income tax (not profits tax) for petitioner's taxable year ended January 31, 1944.

Petitioner's income tax return for the period here involved was filed on April 14, 1944.

The general three year statute of limitations expired on April 14, 1947.

On December 29, 1955, over 8 years after it expired and over 11 years and 8 months after petitioner's return was filed, the notice of deficiency herein was mailed to it.

Petitioner duly filed a petition with the Tax Court alleging (R. 6):

"The respondent erred in failing to hold the assessment of additional income tax for the period ended January 31, 1944 was barred by the statute of limitations."[1]

Respondent filed an answer in which, after denying this allegation of error, he "further" alleged as an affirmative defense "that the period of time within which an assessment could properly be made had not expired under the provisions of Section 3807." (R. 13)

Petitioner filed a reply expressly denying this allegation (R. 14). After trial and filing of briefs, respondent moved to file an amended answer to spell out in greater detail the Section 3807 defense (R. 15, 16) which motion was denied (R. 4).

The Tax Court, in an opinion not reviewed by that court, held (R. 52) "here *such refund* of an overpayment *was allowed by this court* in its aforementioned final decision of April 12, 1955." (Italics ours) The decision referred to is set forth at page 43 of the record and merely determines an overpayment. The Tax Court also found this essential fact (bottom p. 42, top p. 43):

"In said decision refund of an overpayment in petitioner's excess profits tax for said taxable year was allowed."

If this Tax Court decision finding an overpayment (R. 43) does not show its refund is allowed, then it must be conceded the above quoted essential finding and conclusion of the Tax Court is wrong on its face. The case is as simple as that.

The ground of the Court of Appeals affirmance of the Tax Court necessarily must be the assumption of that

[1] The court will note this plea does not specify any particular section of the statute of limitations.

court that the said Tax Court's order finding an overpayment *ipso facto* allows its refund. Whether it does or does not is the only question presented here. If it does not the decision below cannot stand because Section 3807 expressly states it only applies "if" a refund was allowed.

REASONS FOR GRANTING THE WRIT

The court below "has decided a federal question in a way in conflict with applicable decisions of this court."

Essential to sustain its decision is its holding a refund was allowed by the Tax Court. This is directly contrary to *United States Ex Rel. Girard Trust Co.* v. *Helvering*, 301 US 540, 542 and the holding in *Commissioner* v. *Gooch Milling & Elevator Co.*, 320 US 418 at page 420, that the Tax Court "has no power to order a refund or credit should it find an overpayment."

A Court of Appeals decision to the same effect, in conflict with that of the court below is *Empire Ordnance Co.* v. *Harrington*, 249 F(2d) 680 at page 682.

These decisions, squarely on the issue, were cited to the Court of Appeals and wholly ignored by it—certainly a departure "from the accepted and usual course of judicial proceedings."

Also the decision below is directly contrary to an example given in a contemporaneous Treasury Regulation of 15 years standing which has during that time necessarily been relied upon by the Treasury in assessing taxes. See 26 C.F.R. 370, Section 473.4(e) and C.B. 1944, example 1. top p. 469.

Finally with millions of tax returns filed annually questions of limitation are of obvious importance.

ARGUMENT.

It must be conceded, as Section 3807 plainly says, allowance of a refund of the overpayment of profits tax found in the prior case is essential to extend the 3 year general period of limitation.

The essential Tax Court finding appears at page 42 of the record and reads:

> "In said decision refund of an overpayment in petitioner's excess profits tax for said taxable year was allowed."

This is manifestly and unquestionably wrong "which no body can deny" because the said decision is also set forth in the Tax Court findings at page 43 of the record and shows on its face it does not allow a refund but merely finds an overpayment. It does not and could not allow the refund of this overpayment. This the Tax Court lacks jurisdiction to do. The only person authorized by statute to allow a refund is "The Secretary or his delegate" (Section 6402 Title 26 U.S.C.) and Section 6407 says the date of its allowance is the date the Secretary or his delegate signs the schedule. (*Cf. Swift & Co. v. United States*, 282 US 468).

We cited to the court below the holding of this Court in *United States Ex Rel. Girard Trust Co. v. Helvering*, 301 US 540, 542:

> "The Board has not ordered a refund. It could not rightly do so for its jurisdiction is limited to the determination of the amount of deficiency or overpayment."

The court below ignored this case which is certainly a departure from the usual course of judicial appellate proce-

dure with respect to decisions of this Court. One so glaring that counsel, in many years practice, recall no other such instance.

In *Commissioner* v. *Gooch Milling Co.*, 320 US 418, this Court said at page 420:

> ". . . it has no power to order a refund or credit should it find an overpayment."

Therefore, it is plain the conclusion that the Tax Court's order finding an overpayment *ipso facto* allowed its refund is wrong on its face and cannot stand.

See also *Empire Ordnance Co.* v. *Harrington*, 249 F(2d) 680 at page 682, which points out the jurisdiction of the Tax Court is still the same. And the statute as to jurisdiction has not been changed since the year 1936 involved in this Court's decision in the *Gooch Milling* case.

The opinion of the Tax Court in the case at bar was not reviewed by the full court. In *Jones* v. *Commissioner*, 34 BTA at p. 283, (opinion by present presiding Judge) it is said:

> "Credit or refund are matters over which the Board has no jurisdiction whatsoever."

In *Huntington National Bank*, 13 TC 760, it is said at page 773, this is "well settled."

Statutes provide for payment of interest on refunds whether made as a result of court order or otherwise and that is one reason the Code fixes the date they are "allowed" as the date on which the Secretary or his delegate authorizes the schedule of the overpayment. Also, it is one important reason the Code authorizes only the Secretary or his delegate to allow them.

If he has allowed a refund, it is peculiarly within the knowledge of the Service which can easily prove it. Before

the Tax Court it was never even claimed and never even attempted to be pleaded by respondent in his amended answer (R. 16) that a refund was allowed, probably because he felt it was not. It was not stated in the notice of deficiency a refund had been allowed. Also, respondent did not contend before the Tax Court that the Tax Court finding of an overpayment in the prior case *ipso facto* allowed its refund and would hardly have done so in view of this example in his regulation promulgated contemporaneously under Section 3807 and for over 15 years relied upon.

The example in Reg. Sec. 473.4 (1944 C.B. p. 468) reads as follows:

> "*Example.* Corporation X on March 15, 1941, filed a return and paid a tax as a personal holding company for the calendar year 1940. The period of limitations provided in section 322 upon filing a claim for refund of such personal holding company tax expired on March 15, 1944. The Commissioner within the applicable period of limitations asserted a deficiency against Corporation X in respect of the excess profits tax for such taxable year. On March 1, 1946, it was determined under a decision of The Tax Court of the United States that Corporation X was not a personal holding company and was therefore subject to excess profits tax. Such excess profits tax was assessed on May 1, 1946. Under the provisions of section 3807, Corporation X may file a claim for refund of the personal holding company which it paid, or credit or refund may be allowed or made if no claim is filed, as if the period of limitations upon filing claim for credit or refund, or the allowing of credit or refund if no claim is filed, did not expire until May 1, 1947."

Furthermore, the legislative history supports the example in the regulation because it shows Section 3807 as added by the Senate (90 Cong. Rec. 275, 1944) made the Tax Court's determination enough but the Conference Committee changed it to the form in which it was enacted and which expressly requires that a refund be allowed, probably to help pay the deficiency.

OTHER POINTS

While the foregoing is enough, other points showing the decisions below are clearly wrong are that besides requiring a refund, Section 3807 also requires, before it can apply among other things, a showing that (Section 3807(b)(2) "the application of the law and facts determined in the ascertainment of such overpayment to any other tax of the taxpayer under Chapter 1 or Chapter 2 for the same taxable year would result in an increase or decrease in the amount of the tax previously determined." The Tax Court held:

> "The decision, as shown on its face, was based on the opinion of this court in the above mentioned case (filed Oct. 29, 1954 and reported at 23 T.C. 163) in which one of the issues pertained to the amount of excess profits credit allowable to the petitioner." (R. 44)

A reading of the prior opinion (23 TC 163), shows this was not one of the issues decided therein.

The Court of Appeals states "a reduction of excess profits tax *ipso facto* resulted in a correlative increase of income tax liability." It repeats this thought twice more in its opinion. This is plain error. Income and tax on it in the prior case (23 TC 163) were reduced because respondent erroneously included in income, profit from purchase of bonds. This sum did not become subject to income tax because the Tax Court held consent to reduce basis by its amount was valid and in such case the Code excludes it from income tax also.

Furthermore, Section 3807 (c) expressly requires "changes shall be made in items which are the subject of such determination and in items which are affected thereby and in no others."

CONCLUSION.

Among the decisions in thousands of tax cases this Court has seen or will see, it is doubtful if it has or will ever see one so obviously, patently and clearly wrong on its face as this one.

In case of a deficiency found by the Tax Court, Section 3807 requires not only that one be found but also that it be assessed. Only the Secretary or his delegate can do that. See title 26 U.S.C. Sec. 6201(a).

The crucial words of Section 3807 requiring a refund before it can apply are:

> "If under a determination in respect of a tax imposed by Chapter 1 or Chapter 2 a deficiency is assessed or a credit[*] or *refund of an overpayment is allowed.*" (Italics ours)

The Tax Court's crucial finding (R. 42) "in said decision refund of an overpayment . . . was allowed" (R. 43) and "the refund of overpayment allowed in said decision" (R. 52) is clearly wrong on its face because said decision (R. 43) itself shows it merely determined an overpayment. Under decisions of this Court that is all the Tax Court had jurisdiction to do. It did not and could not allow its refund. See title 26 U.S.C. Sec. 6402.

As plainly as English language can do, the last quoted statute not only requires the "determination" of an "overpayment" but further expressly requires that "under a determination" of an overpayment "a refund is allowed." The only person in the United States authorized to allow a refund is "the Secretary or his delegate" (Section 6402 IRC) and the Revenue Code itself does not leave the date a refund or credit is allowed in doubt but Section 6407

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[*] Credits and refunds differ. Both carry interest but to different dates (Code Sec. 6611). The Tax Court did not find a credit was allowed. It found a "refund." (R. 42, 44, 52) Only the Tax Court can find facts: *Hulburd* v. *Comm.*, 296 US at p. 306.

quoted on page 2 hereof, thereof specifically states it is the date the Secretary or his delegate signs the schedule.

Not only is the crucial finding of the Tax Court that its order of overpayment allowed "refund of an overpayment" unquestionably wrong on its face, but the conclusion of the Court of Appeals that the one year period "includes the date of determination by the Tax Court that taxpayer is entitled to either a credit or a refund" (App. p. 22) assumes without discussion the crucial point on which the case turns, *i.e.* that the Tax Court order determined the taxpayer was "entitled to a refund." This it did not do.

These reasons mentioned in the rules of this Court exist for granting the writ. First, in so deciding this federal question, the Court of Appeals is squarely in conflict with the two decisions of this Court quoted from on page 4 hereof.

The second reason for granting the writ, mentioned in the rules of this Court is this. When a decision of this Court squarely on point is cited to a Court of Appeals and that decision is never mentioned by that court, such court has "so far departed from the accepted and usual course of judicial proceedings" as to warrant an admonition by this Court to pay attention to its decisions.

A third reason mentioned in the rules of this Court for granting the writ exists here—conflict with a decision of another circuit on whether an order of the Tax Court allows a refund.

A fourth reason is that the decision below is contrary to the example in the contemporaneous Treasury Regulation of over 15 years' standing which must have been relied on during that long period of time.

And a fifth reason is the last report of the Commissioner which shows 93 million income tax returns were filed the preceding year and obviously statutes of limitation are of greater importance.

For any one of the foregoing reasons the writ should be granted.[3]

All of which is respectfully submitted.

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Counsel for Petitioner

October 26, 1960.

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[3] In 72 Harvard Law Review at 1225, it is said: "Tax cases one understands are not the favored fare of most of the federal judiciary," and at p. 1220, "Whatever the judge may see in the tax cases, tax cases give an almost unrivalled view of the judge."

APPENDIX

EXHIBIT A

Internal Revenue Code of 1939:

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

(a) *General Rule.*—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

SEC. 3807 [as added by sec. 513(a) of the Revenue Act of 1943, *supra*][1]. PERIOD OF LIMITATIONS IN CASE OF RELATED TAXES UNDER CHAPTER 1 AND CHAPTER 2.

(a) *Definitions.*—As used in this section—

(1) The term "tax previously determined" shall have the meaning assigned to such term by section 3801(d).

(2) The term "the same taxable year" shall include any taxable year which coincides in whole or in part with the taxable year for which the determination referred to in subsection (b) is made.

(b) *Extension of Period of Limitations.*—If—

(1) under a determination in respect of a tax imposed by Chapter 1 or Chapter 2, a deficiency is assessed or a credit or refund of an over-payment is allowed, within the period of limitations properly applicable thereto, and

[1] By Section 513(b) of the 1943 Act, Section 3807 was made applicable to all taxable years beginning after December 31, 1939.

(2) the application of the law or facts determined in the ascertainment of such deficiency or overpayment to any other such tax of the taxpayer under Chapter 1 or Chapter 2 for the same taxable year would result in an increase or decrease in the amount of the tax previously determined in respect of such other tax, and

(3) on any date prior to the expiration of one year from the assessment of a deficiency or the allowance of a credit or refund in respect of the tax referred to in paragraph (1), the assessment of a deficiency or the allowance of a credit or refund in respect of the tax referred to in paragraph (2) is prevented (except for the provisions of section 3801 or 734) by the operation (whether before, on, or after the date of enactment of the Revenue Act of 1943) of any law or rule of law other than this section and other than section 3761 (relating to compromises),

then upon such date the increase or decrease in the tax referred to in paragraph (2) shall be considered a deficiency or an overpayment, as the case may be. Such deficiency may be assessed and collected or such overpayment may be credited or refunded as if on the date the deficiency is assessed or the credit or refund allowed in respect of the tax referred to in paragraph (1) one year remained before the expiration of the periods of limitation upon assessment or filing claim for refund in respect of the tax referred to in paragraph (2) for the same taxable year.

(c) *Adjustment Unaffected by Other Items, Etc.*—In determining whether an increase or decrease in the amount of the tax previously determined shall be cor-

sidered to result from the application of the law or facts under a determination referred to in subsection (b)(1) changes shall be made in items which are the subject of such determination and in items which are affected thereby, and in no others. The amount which may be assessed or allowed as a credit or refund under subsection (b) shall not be diminished by any credit or set-off based upon any item which was not the subject of such determination or affected thereby. Such amount, if paid, shall not be recovered by a claim or suit for refund or suit for erroneous refund based upon any item which was not the subject of such determination or affected thereby, except in connection with a subsequent application of this section.

(26 U.S.C. 1952 ed., Sec. 3807.)

Internal Revenue Code of 1954:

SEC. 7453. RULES OF PRACTICE, PROCEDURE AND EVIDENCE.

The proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe and in accordance with the rules of evidence applicable in trials without a jury in the United States District Court of the District of Columbia.

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Ambassador Hotel Company of Los Angeles,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.

No. 16,589
June 10, 1960

On Petition for Review of Decision of the Tax Court of the United States

Before CHAMBERS and STEPHENS, Circuit Judges and MATHES, District Judge.

MATHES, District Judge.

This is a taxpayer's petition to review a decision of the Tax Court upholding the Commissioner's determination of a deficiency. *Ambassador Hotel Co. of Los Angeles* v. *Commissioner*, 1959, 32 T.C. 208. The jurisdiction of this Court is invoked under 26 U.S.C. § 7482(a).

The facts are undisputed. Both income tax and excess profits tax were assessed to the taxpayer for its tax year ending January 31, 1944, the excess-profits tax assessment having been made pursuant to §§ 710 and 711 of the 1939 Internal Revenue Code. [26 U.S.C. §§ 710 and 711 (1939), repealed by 59 Stat. 568 (1945).] Challenging the excess-profits tax assessment for that year, petitioner sought a redetermination in the Tax Court. This attack upon the excess-profits tax assessment was successful, and

April 12, 1955, the Tax Court entered a final order in favor of the taxpayer. Specifically, this order determined that petitioner was entitled to a refund or credit of $83,226.54[1] for overpayment of excess profits tax. *Ambassador Hotel Co. of Los Angeles* v. *Commissioner*, 1954, 23 T.C. 163, 168-169.

By virtue of the provisions of the 1939 Code, a reduction in excess profits tax ipso facto resulted in a correlative increase in income tax liability, since the pattern established by the 1939 Code made the two taxes directly interrelated through the so-called "two-basket" approach. Under this approach, the entire taxable income was divided into two segments, one taxed at the income tax rate, and the other at the higher excess profits rate. Hence a redetermination which operated to change the amount or size of one segment resulted, by operation of law, in a corresponding change in the amount or size of the other. [See 26 U.S.C. §§ 710-731 (1939), repealed by 59 Stat. 568 (1945); see also 10 Mertens, Law of Federal Income Taxation § 57.77 at 128, n. 85 (Rev. ed. 1958).]

In keeping with this pattern for dividing the taxable income for income and excess profits tax purposes, the Commissioner, after the Tax Court's determination that there had been an overpayment of excess profits tax, proceeded to determine the correlative increase in petitioner's income tax liability and the resultant deficiency in petitioner's income tax for the tax year involved. On December 29, 1955, within a year following the date of the Tax Court's order, the Commissioner sent a ninety-day letter to petitioner, thereby giving notice of this income tax deficiency for the tax year ending January 31, 1944.

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[1] Corrected to $26,475.54 — see App. p. 26.

Inasmuch as the general three-year statute of limitations had already run on the deficiency [see 26 U.S.C. § 275(a) (1939)], the Commissioner added to the customary provisions of the ninety-day letter the statement that "the deficiency of income tax * * * is assessable under the provisions of section 3807 of the Internal Revenue Code of 1939 (relating to period of limitations in case of related taxes under Chapter 1 and Chapter 2)."

The taxpayer thereafter filed with the Tax Court a timely petition seeking a determination that the deficiency assessment was not owing because time barred. [See 26 U.S.C. § 275(a), *supra*.] The Tax Court held that the burden of proving facts to show that the general three-year period of limitations was not here extended by virtue of § 3807 of the 1939 Code [26 U.S.C. § 3807] rests upon the taxpayer and not upon the Commissioner and, finding that this burden had not been met, the Tax Court upheld the Commissioner. In reaching this decision, the Tax Court ruled that § 3807 of the 1939 Code was repealed only with respect to those taxable years ending after June 30, 1950. *Ambassador Hotel Co. of Los Angeles v. Commissioner*, *supra*, 32 T.C. 208.

Insofar as now pertinent, § 3807 of the 1939 Code provides that:

> "(b) Extensions of Period of Limitations. If—
>
> "(1) under a determination in respect of a tax imposed by Chapter 1 or Chapter 2, a deficiency is assessed or a credit or refund of an overpayment is allowed, within the period of limitations properly applicable thereto, and

"(2) the application of the law or facts determined in the ascertainment of such deficiency or overpayment to any other such tax of the taxpayer under Chapter 1 or Chapter 2 for the same taxable year would result in an increase or decrease in the amount of the tax previously determined in respect of such other tax, and

"(3) on any date prior to the expiration of one year from the assessment of a deficiency or the allowance of a credit or refund in respect of the tax referred to in paragraph (1), the assessment of a deficiency or the allowance of a credit or refund in respect of the tax referred to in paragraph (2) is prevented * * * by the operation (whether before, on, or after the date of enactment of the Revenue Act of 1943) of any law or rule of law other than this section

* * *

"then upon such date the increase or decrease in the tax referred to in paragraph (2) shall be considered a deficiency or an overpayment, as the case may be. Such deficiency may be assessed and collected or such overpayment may be credited or refunded as if[,] on the date the deficiency is assessed or the credit or refund allowed in respect of the tax referred to in paragraph (1) [,] one year remained before the expiration of the periods of limitation upon assessment or filing claim for refund in respect of the tax referred to in paragraph (2) for the same taxable year."

The petition to review stands upon two grounds. First, that the burden of proof as to applicability of § 3807 was erroneously placed upon the taxpayer to petitioner's prejudice since, it [laid upon the Com-

missioner as should have been done, the record discloses that the burden has not been met; and second, that in all events repeal of § 3807 by § 304(c) of the Revenue Act of 1950 operated retroactively as a repeal for all taxable years, and not merely prospectively for the years subsequent to 1950.

Analysis reveals that petitioner's burden-of-proof contention raises nothing more than a question of law, namely, whether or not the undisputed facts at bar supply the requisite elements necessary to bring § 3807 into operation, thus making timely the Commissioner's assessment of income tax deficiency. And since the answer turns wholly upon the proper construction of § 3807 of the 1939 Code, we need not reach the burden-of-proof question.

Petitioner urges that the event referred to in § 3807, as fixing the date on which a credit or refund is "allowed" to provide the one-year extension, is allowance by the Commissioner himself, *i.e.* authorization of the necessary bookkeeping entry by the Secretary or his delegate. [See 26 U.S.C. §§ 6402 and 6407 (1954).] Specifically the argument is that, inasmuch as there is nothing in the record to indicate that the Commissioner "allowed" the excess-profits tax refund in question, one operative fact necessary to bring § 3807 into play is lacking here. The Commissioner, on the other hand, contends that a credit or refund is "allowed", within the meaning of § 3807, when the Tax Court determines that there was an overpayment as to one tax giving rise ipso facto to a deficiency as to the other tax. [See 26 U.S.C. § 322(c) and (d) (1939).]

Although there is some dispute in the commentary and legislative history bearing on the proper construction of § 3807 as regards this particular point [compare 26 C.F.R. 370 § 473.4(e), Example No. 1 with H.R. Rep. No. 1079, 78th Cong., 2nd Sess. 75 (1943); see 10 Mertens, Law of Federal Income Taxation, *supra*, § 57.77 at 132], both reason and the obvious policy which prompted the enactment lend firm support to the Commissioner's construction of the verb "allowed" as used in § 3807.

Admittedly § 3807 was enacted in recognition of the fact that the 1939 Code provided a direct interrelationship between the excess profits tax and the income tax [see 26 U.S.C. § 26(c) (1939), as amended by 56 Stat. 806 and 58 Stat. 53 (1942), repealed by 59 Stat. 570 (1945)], such that when, as at bar, a redetermination decreases the excess profits tax, a correlative increase in income tax ipso facto results. Recognizing the clear likelihood that the general three-year period of limitations provided in § 275(a) might run as to one tax while the other was being redetermined through litigation, the Congress created in § 3807 a particular, and in effect an additional, one-year period during which an adjustment could be made and steps taken to enforce it after the three-year period had already run. As Senator George commented during debate upon the bill: "The proposed amendment is designed to provide reciprocal treatment to taxpayers and to the Government, under which the effect upon one tax of adjustments in another tax may be properly made. It would thereby avoid inequitable results possible under the present law." 90 Cong. Rec. 275 (1944).]

[1] Thus legislative history permits and underlying policy compels the conclusion that the date of allowance within the meaning of § 3807 includes the date of a determination by the Tax Court that a taxpayer is entitled to either a credit or a refund. This construction results in the added one-year period of limitation provided in § 3807 commencing by operation of law; whereas that urged by petitioner would permit the Commissioner, always an interested party to any tax controversy, in effect to control the date of commencement of the one-year period. [*Cf. Fellerson v. United States*, D.C.S.D. Cal. January 21, 1960, 28 U.S.L. Week 2372]. To construe the statute as petitioner urges would be in derogation of the wise public policy, which underlies all statutes of limitation, to put an end to the possibility of litigation after the lapse of a reasonable and predeterminable period of time. See: *Guaranty Trust Co. of New York v. United States*, 1938, 304 U.S. 126, 136, 58 S.Ct. 785, 82 L.Ed. 1224: *Bailey v. Glover*, 1879, 21 Wall. 342, 88 U.S. 342, 349-350, 22 L.Ed. 636.

[2] The record before us shows beyond dispute that here there was:

(1) A timely allowance of a credit or refund [26 U.S.C. § 3807(b)(1), *supra*]; and

(2) An "application of the law or facts * * * in the ascertainment of such * * * overpayment" in excess profits tax, which resulted in an increase in the amount of income tax as previously determined [26 U.S.C. § 3807(b)(2) and § 26(c), *supra*]; and

(3) The deficiency in income tax arising as a result of the Tax Court's determination of excess profits tax overpayment is otherwise barred by the general three-year statute of limitations [26 U.S.C. § 3807(b)(3) and § 275(a), *supra*].

It follows then that all the requisite facts are present at bar to bring § 3807 into operation to provide an additional year from the date of the Tax Court's determination of the overpayment of excess profits tax within which to assess the income tax deficiency.

Turning now to the second ground for reversal urged by petitioner, namely, that the repeal of § 3807 by § 304(c) of the Revenue Act of 1950 amounted to a repeal for tax years prior, as well as subsequent, to 1950. Section 304(c) provides *inter alia* that:

> "Section 3807 of such [1939] code (relating to period of limitations in case of related taxes under chapter 1 and chapter 2) is repealed."

Section 304 embodies a series of "Technical Amendments" to the 1939 Code. Each of the series employs the term "amended", with the single exception of subsection (c)[1] where the term "repealed" appears. Subsection (g) of § 304 declares:

> "The amendments made by this section shall be applicable with respect to taxable years ending after June 30, 1950."

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[1] Corrected to (c) App. p. 26.

Inasmuch as subsection (c) uses "repealed" instead of "amended", petitioner argues that subsection (c) is not qualified by subsection (g) so as to be applicable only for the years after 1950, as are the other subsections, even though all the subsections literally contain amendments.

This argument is entirely lacking in merit. The title to § 304 is "Technical Amendments", and the section appears to encompass all the subsections within it. Moreover, when confronted with any question as to the applicability of § 3807 in the cases reported since the Revenue Act of 1950 was enacted, the courts have consistently considered the section as remaining in effect for all tax years ending before June 30, 1950. [*Merrimac Hat Corp.* v. *Commissioner*, 1959, 32 T.C. 1082; *Morrisdale Coal Mining Co.* v. *United States*, 1956, 142 F. Supp. 930, 932-933, 135 Ct. Cl. 483, 485-488; *Pine Hill Crystal Spring Water Co.* v. *United States*, D.C.S.D. N.Y. 1954, 121 F. Supp. 480, 482; accord, 10 Mertens, Law of Federal Income Taxation, *supra*, § 57.77 at 128.]

For the reasons stated, the decision of the Tax Court is affirmed.

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Ambassador Hotel Company of Los Angeles, a corporation, *Petitioner*, vs. Commissioner of Internal Revenue, *Respondent*.	No. 16,589

JUDGMENT

Petition to review a decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of the record from the Tax Court of the United States, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the decision of the said Tax Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment
Filed and entered: June 10, 1960
Frank H. Schmid, Clerk

EXHIBIT D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Ambassador Hotel Company of Los Angeles, *Petitioner,* vs. Commissioner of Internal Revenue, *Respondent.*	No. 16,589

On Petition for Rehearing

Before: Stephens and Chambers, Circuit Judges, and Mathes, District Judge

Per Curiam:

The suggestion for a rehearing en banc is rejected.

The opinion is amended by inserting "26,475.54" in lieu of "$83,336.54" at page 1 of the slip sheet, line 11 of the second paragraph, and by inserting "subsection (c)" in lieu of "subsection (e)" at page 6 of the slip sheet, line 3 of the second full paragraph.

The petition for rehearing is denied.

/s/ Albert Lee Stephens

/s/ Richard H. Chambers
United States Circuit Judges

/s/ Wm. C. Mathes
United States District Judge

(Endorsed) Filed
August 1, 1960
Frank H. Schmid, *Clerk*

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Office-Supreme Court, U.S.
FILED
DEC 5 1960
JAMES R. BROWNING, Clerk

No. 509

In the Supreme Court of the United States

OCTOBER TERM, 1960

AMBASSADOR HOTEL COMPANY OF LOS ANGELES,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
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CHARLES K. RICE,
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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 509

AMBASSADOR HOTEL COMPANY OF LOS ANGELES, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 39-64) are reported at 32 T.C. 208. The opinion of the Court of Appeals (R. 80-85; Pet. 16-24) is reported at 280 F. 2d 303.

JURISDICTION

The judgment of the Court of Appeals (R. 86; Pet. 25) was entered on June 10, 1960. A petition for rehearing was denied (R. 87; Pet. 26) on August 1, 1960.[1] The petition for a writ of certiorari was

[1] By the same order (R. 87; Pet. 26), the Court of Appeals also rejected a suggestion for a rehearing *en banc*.

filed on October 26, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the income tax deficiency for fiscal year 1944 determined by the Commissioner against the taxpayer was assessable by virtue of the one year special limitation period prescribed by Section 3807 of the 1939 Internal Revenue Code with respect to the related World War II excess profits tax overpayment for the same year determined by the Tax Court in a prior case.

STATUTE INVOLVED

Section 3807 and other pertinent provisions of the 1939 Internal Revenue Code are set forth in the Appendix, *infra*, pp. 13–26.

STATEMENT

In a prior proceeding[2] in the Tax Court with respect to the taxpayer's excess profits tax liability for its fiscal year ended January 31, 1944, it was finally decided on April 12, 1955, that there was an overpayment of $26,475.54,[3] "which amount was paid within three years before the filing of the claim, which claim was filed within three years from the time the return was filed * * *." (R. 43.)

Subsequently, on December 29, 1955 (R. 7), the Commissioner—by the usual 90-day letter, or statu-

[2] *Ambassador Hotel Co. of Los Angeles* v. *Commissioner*, 23 T. C. 163.

[3] That overpayment was found in lieu of a $92,000 deficiency in excess profits tax which had been determined by the Commissioner for that year. (R. 9.)

tory notice of deficiency, and an accompanying Statement (R. 7–12)—gave notice to the taxpayer of the determination of a deficiency of $33,290.61 in income tax for the same year (fiscal year 1944), explaining the deficiency (with detailed computations) as one resulting from the adjustment to the related excess profits tax made in the prior case (R. 9), and stating that the deficiency was "assessable under the provisions of section 3807 of the Internal Revenue Code of 1939" (R. 10; see also R. 40–41, 44–45).

The taxpayer challenged this income tax deficiency in the Tax Court in the present proceeding (R. 5–12)—only upon the ground that it "was barred by the statute of limitations" (R. 6; see also R. 41, 45, 48).

The Tax Court resolved the issue against the taxpayer (R. 38–64, 71), holding that the proposed income tax deficiency was timely under Section 3807 of the 1939 Code,[4] since it was asserted within one year after the Tax Court determined (in the prior case) the excess profits tax overpayment for the same fiscal year (R. 45–64).[5]

The Court of Appeals affirmed. (R. 80–85; Pet. 16–24.)

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[4] The taxpayer's return having been filed on April 14, 1944 (R. 45), the proposed income tax deficiency would have been barred—under the general three year period of limitation prescribed in Section 275 of the 1939 Code—but for the application of Section 3807 (R. 45, 53; see also R. 6, 13).

[5] A subsequent motion (R. 64–71) by the taxpayer for a review by the full Tax Court was denied (R. 71).

ARGUMENT

The courts below correctly upheld the challenged income tax deficiency as timely under Section 3807 of the 1939 Code (Appendix, *infra*, pp. 24–26), since the deficiency was clearly determined within the one year special period of limitation prescribed in that section with respect to related taxes, such as the corporate income tax and the World War II excess profits tax, under Chapters 1 and 2 of the 1939 Code. Moreover, there is no conflict of decisions and no question of general importance warranting review by this Court.

1. During the Second World War, under the system in effect beginning with 1942, the corporate income tax and the excess profits tax were inter-related, so that the income tax was imposed only upon that portion of corporate income which was not subjected to the excess profits tax, with the result that any subsequent adjustment with respect to the excess profits tax would require a corresponding adjustment with respect to the income tax. After the 1942 change[*]—by the so-called "cross-credit" provision of Section 26(c) (Appendix, *infra*, pp. 15–16), and by complementing provisions in Section 13(a)(2) (Appendix, *infra*, p.

[*] Before the 1942 change, the amount of the excess profits tax itself constituted a deduction for the purpose of computing the normal income tax and surtax upon corporations, under Chapter 1 of the 1939 Code. See Section 23(c) of that Code, as amended by Section 202(a) of the Revenue Act of 1941, c. 412, 55 Stat. 687.

Prior to that, i.e., for the year 1940, the Chapter 1 income taxes were deductible from the income to be subjected to the excess profits tax. See Section 711(a)(1)(A) and 2(C) of the 1939 Code, as added by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974.

13), and Section 15(a) (Appendix, *infra*, pp. 14–15), as amended by Section 105 (a), (b) and (d) of the Revenue Act of 1942, c. 619, 56 Stat. 798—a corporation, for the purpose of computing its normal income tax and its surtax under Chapter 1 of the Code, was allowed a credit for the amount of income subjected to the excess profits tax, or, specifically, a credit in "an amount equal to its adjusted excess-profits net income (as defined in section 710(b))." The change resulted in a complete inter-relationship, and a complete and automatic interdependence, between the income and excess profits taxes. See *Mutual Shoe Co.* v. *Commissioner*, 238 F. 2d 729, 733 (C.A. 1st), certiorari denied, 353 U.S. 935; see also *United States* v. *Koppers Co.*, 348 U.S. 254, 259, 266–267, fns. 7 and 16.

To give complete effectiveness to the inter-relationship of the two taxes, Congress subsequently added Section 3807 to the Code, by Section 513(a) of the Revenue Act of 1943, c. 63, 58 Stat. 21—to provide that, where an adjustment is made with respect to one of the taxes under Chapters 1 or 2, and that adjustment results in an overpayment (or deficiency) in that tax, which is not barred, and where that adjustment, when appropriately reflected in the computation of the other related tax, would result in a deficiency (or overpayment) in the other tax, which is then barred, the resultant deficiency (or overpayment) in such other tax may nevertheless be determined within one year after the adjustment was made with respect to the first tax. See Statement of Managers on the part of the House, H. Conference Rep. No. 1079, 78th Cong., 2d Sess., pp. 72–

76 (1944 Cum. Bull. 1059, 1082–1085); 90 Cong. Rec., Part 1, p. 275; see also Regulations prescribed under Section 3807, by T.D. 5409, 1944 Cum. Bull. 466–472 (26 C.F.R. §§ 473.1–473.7).'

2. The instant case presents a situation which Section 3807 was clearly designed to meet, so as to permit the assessment of a deficiency in income tax at any time within one year after the allowance of a refund or credit in the related excess profits tax for the same year.

The excess profits tax overpayment determined in the prior case automatically gave rise, by operation of law, to an income tax deficiency which would have been barred (under the general three year period of limitations prescribed in Section 275) but for the application of Section 3807. See *Morrisdale Coal Mining Co.* v. *Commissioner*, 21 T.C. 393; *Pine Hill Crystal Spring Water Co.* v. *United States*, 121 F. Supp. 480 (S.D. N.Y.); *Morrisdale Coal Mining Co.* v. *United States*, 142 F. Supp. 930 (C. Cls.). See also *Merrimac Hat Corp.* v. *Commissioner*, 32 T.C. 1082; *Philadelphia*

'In the Korean War Excess Profits Tax Law, Congress deliberately discarded the so-called "two-basket" approach of the World War II law, and substituted a system whereby the excess profits tax would constitute an "additional tax", over and above the regular income tax, under Chapter 1 of the Code—so that the two taxes (income and excess profits) would be treated as one for general administrative purposes (*i.e.*, for purposes of the statute of limitations, the allowance of refunds or credits, the sending of 90-day letters, etc.), and so that any subsequent adjustment as to the excess profits tax would not also require an adjustment as to the income tax. See H. Rep. No. 3142, 81st Cong., 2d Sess., p. 4 (1951-1 Cum. Bull. 187, 189); S. Rep. No. 2679, 81st Cong., 2d Sess., pp. 4–5 (1951-1 Cum. Bull. 240, 242–243).

Macaroni Co. v. *United States*, 180 F. Supp. 539 (E.D. Pa.). As both courts below pointed out (R. 52–54, 84–85; Pet. 22–23); all of the elements necessary to make Section 3807 operative are present.

3. There is no basis for the taxpayer's assertion (Pet. 8) that it is not shown that the reduction in excess profits tax determined in the prior case automatically resulted in a correlative increase in income tax. As explicitly indicated (R. 11) in the Statement accompanying the Commissioner's deficiency notice, the Tax Court's decision in the prior case had effected increases in "Excess profits credit" and "Unused excess profits credit" in the aggregate amount of $83,226.54. Thus, the taxpayer's "adjusted excess profits net income" under Section 710(b) (Appendix, *infra*, p. 21) was reduced for excess profits tax purposes by that aggregate amount, and that amount, thereby released from the reach of the excess profits tax, automatically became—by reason of the reduced "cross-credit" under Section 26(e)—subject to the income tax (normal and surtax), through correspondingly reduced credits under Section 13(a)(2) and 15(a).[*]

4. There is no merit to the taxpayer's contention (Pet. 4, 5, 9, 10) that the courts below erred in assuming that a refund (or credit) of an excess profits tax overpayment was "allowed" in the prior

---

[*] The income tax deficiency challenged in this proceeding is exactly 40%—the combined rate then applicable (see R. 10) for the normal tax (24%) under Section 13(b)(1) (Appendix, *infra*, p. 14) and the surtax (16%) under Section 15(b)(3) (Appendix, *infra*, p. 15)—of that $83,226.54.

proceeding—so as to bring Section 3807 into play (cf. Pet. 3–4). Contrary to the assertion (Pet. 5) that the decision in the prior case "merely finds an overpayment", the Tax Court in the prior case actually decided (R. 43) that there was an excess profits tax overpayment of $26,475.54 which was paid within three years prior to the filing of the claim (for refund), which had been filed within three years from the filing of the return—which, in and of itself, by operation of law, under the provisions of Section 322(d) of the 1939 Code (Appendix, *infra*, pp. 18–19) [9] or of the successor provisions of Section 6512(b) of the 1954 Internal Revenue Code, made that overpayment refundable (or creditable). Thus, the prior decision was, at least for the purposes of Section 3807, the legal equivalent of an order allowing the refund or credit of the excess profits tax overpayment, which Section 322(d) itself directed "shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer"—in keeping with the requirement of Section 322(a)(1) (Appendix, *infra*, p. 16) that the overpayment shall be first

[9] These provisions, conferring authority upon the Tax Court to in effect direct the refund (or credit) of any overpayment it might determine, had been first introduced into the law in Section 322(d) and Section 504 of the Revenue Act of 1934, c. 277, 48 Stat. 680—to confer jurisdiction upon the Board of Tax Appeals (as the Tax Court was then known) "to determine not only that the taxpayer has made an overpayment of tax, but also whether such overpayment is refundable." H. Rep. No. 704, 73d Cong., 2d Sess., pp. 35, 37–38 (1939–1 Cum. Bull. (Part 2) 554, 581, 582). See also S. Rep. No. 558, 73d Cong., 2d Sess., pp. 44, 47 (1939–1 Cum. Bull. (Part 2) 586, 620, 622).

credited against any taxes due from the taxpayer, and the balance refunded.

5. Contrary to the taxpayer's suggestion (Pet. 7), the conclusion of the courts below is fully consistent with the available legislative history. That history indicates rather clearly, by the changes in the phraseology of Section 3807 which were made at the conference on the bill which became the Revenue Act of 1943, that it was not intended that Section 3807 should come into play only after the making of a refund or credit of an overpayment, but that it should become operative merely upon the allowance of a credit or refund of an overpayment [10]—which, under our statutory scheme, can come about either by the administrative action of

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[10] Section 3807 was first offered as a "floor" amendment in the Senate (90 Cong. Rec., Part 1, p. 275), after the Bill (which became the Revenue Act of 1943) had been reported upon by the Finance Committee, and the proposal was adopted in the form in which offered, and in that form found its way into the bill as passed by the Senate (*id.*, pp. 275, 543). The only changes made in Section 3807 came about in the conference (cf. *id.*, pp. 634, 1299–1301, 1358–1359), and perhaps one of the most significant changes was in the phraseology used to specify the conditions upon which Section 3807 should become operative in the case where an overpayment is determined first in one of two related taxes. As originally proposed and as passed by the Senate, Section 3807 would have become operative if a "credit or refund [is] allowed or made" (see 90 Cong. Rec., Part 1, p. 275). As changed in the Conference, and as finally adopted, it becomes operative if a "credit or refund of an overpayment is allowed" (Section 3807(b)(1)). A similarly significant refinement was reflected in the change, from the language originally proposed to that finally adopted, setting forth that the resultant deficiency in the other (related) tax could be asserted within one year.

the Commissioner [11] or by a decision of the Tax Court.

6. Clearly, there is no conflict, as asserted (Pet. 4, 5–6, 10), with *United States ex rel. Girard Co.* v. *Helvering*, 301 U.S. 540, *Commissioner* v. *Gooch Co.*, 320 U.S. 418, or *Empire Ordnance Corp.* v. *Harrington*, 249 F. 2d 680 (C.A. D.C.). The *Girard* and *Empire* cases involved the wholly unrelated question whether mandamus was the appropriate remedy to compel the Commissioner to refund taxes determined by the Tax Court to have been overpaid. *Gooch* involved an equally unrelated question as to whether the Tax Court had jurisdiction to apply the doctrine of equitable recoupment, so as to offset a barred overpayment for a prior year against a timely deficiency for the taxable year properly before it.

7. Nor is the decision below in any way inconsistent, as claimed (Pet. 4, 7), with the provisions of the Regulations prescribed under Section 3807, 26 C.F.R. §§ 473.1–473.7, *supra*. The particular example, given in Section 473.4 of the Regulations, referred to by the taxpayer (Pet. 7), is of a situation in which the adjustment first made in one of the related taxes covered by Section 3807 results in a deficiency, in which case the statute itself clearly requires that the deficiency be assessed in order for Section 3807 to come into play—whereas, in the situation here, the first adjustment results in an overpayment, in which case Section 3807 becomes operative merely upon the allowance of the credit or refund.

---

[11] Compare Sections 6402(a) and 6407 of the 1954 Code (and their respective predecessors, Sections 322(a) and 3770(a)(3) of the 1939 Code) with Pet. 9.

8. Contrary to the taxpayer's suggestion (Pet. 4, 11), the question presented in this case is not important, since Section 3807 has long since been repealed (see fn. 7, *supra;* R. 59–60, 85), and since it was applicable only with respect to World War II excess profits taxes, as to which the remaining controversies have been rapidly diminishing.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
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DECEMBER 1960.

APPENDIX

Internal Revenue Code of 1939:

SUBTITLE A—TAXES SUBJECT TO THE JURISDICTION OF THE TAX COURT OF THE UNITED STATES[1]

CHAPTER 1—INCOME TAX

* * * * *

SUBCHAPTER B—GENERAL PROVISIONS

PART I—RATES OF TAX

* * * * *

SEC. 13. TAX ON CORPORATIONS IN GENERAL.

(a) [as amended by Sec. 201 of the Revenue Act of 1939, c. 247, 53 Stat. 862, and Sec. 105 (a)(1) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Definitions.*—For the purposes of this chapter—

(1) *Adjusted net income.*—The term "adjusted net income" means the net income minus the credit provided in section 26(a), relating to interest on certain obligations of the United States and Government corporations.

(2) *Normal-tax net income.*—The term "normal-tax net income" means the adjusted net income minus the credit for income subject to the tax imposed by Subchapter E of Chapter 2 provided in section 26(c) and minus the credit for dividends received provided in section 26(b).

---

[1] The name of the Board of Tax Appeals was changed to the Tax Court of the United States by Section 504 of the Revenue Act of 1942, c. 619, 56 Stat. 798.

(b) [as amended by Sec. 101(a) of the Second Revenue Act of 1940, c. 757, 54 Stat. 974] *Imposition of Tax.*—There shall be levied, collected, and paid for each taxable year upon the normal-tax net income of every corporation the normal-tax net income of which is more than $25,000 (except a corporation subject to the tax imposed by section 14, section 231(a), Supplement G, or Supplement Q) whichever of the following taxes is the lesser:

(1) [as amended by Sec. 103(a) of the Revenue Act of 1941, c. 412, 55 Stat. 687] *General rule.*—A tax of 24 per centum of the normal-tax net income; or

(2) [as further amended by Sec. 105(a)(2) of the Revenue Act of 1942, *supra*] *Alternative tax (corporations with normal-tax net income over $25,000, but not over $50,000).*—A tax of $4,250, plus 31 per centum of the amount of the normal-tax net income in excess of $25,000.

* * * * *

(26 U.S.C. 1952 ed., Sec. 13.)

SEC. 15 [as added by Sec. 201 of the Revenue Act of 1942, c. 419, 54 Stat. 516, and amended by Sec. 105(b) of the Revenue Act of 1942, *supra*] SURTAX ON CORPORATIONS.

(a) *Corporation Surtax Net Income.*—For the purposes of this chapter, the term "corporation surtax net income" means the net income minus the credit for income subject to the tax imposed by Subchapter E of Chapter 2 provided in section 26(c) and minus the credit for dividends received provided in section 26(b) (computed by limiting such credit to 85 per centum of the net income reduced by the credit for income subject to the tax imposed by Subchapter E of Chapter 2 in lieu of 85 per centum of the adjusted net income so reduced), and minus, in the case of a public

utility, the credit for dividends paid on its preferred stock provided in section 26(h). * * *

"(b) *Imposition of Tax.*—There shall be levied, collected, and paid for each taxable year upon the corporation surtax net income of every corporation (except a Western Hemisphere Trade Corporation as defined in section 109, and except a corporation subject to the tax imposed by section 231(a), Supplement G, or Supplement Q), a surtax as follows:

(1) *Surtax net incomes not over $25,000.*—Upon corporation surtax net incomes not over $25,000, 16 per centum of the amount thereof.

(2) *Surtax net incomes over $25,000 but not over $50,000.*—Upon corporation surtax net incomes over $25,000, but not over $50,000, $2,500, plus 22 per centum of the amount of the corporation surtax net income over $25,000.

(3) *Surtax net incomes over $50,000.*—Upon corporation surtax net incomes over $50,000, 16 per centum of the corporation surtax net income.

* * * * * * *

(26 U.S.C. 1952 ed., Sec. 15.)

SEC. 26. CREDITS OF CORPORATIONS.

In the case of a corporation the following credits shall be allowed to the extent provided in the various sections imposing tax—

* * * * * *

(c) [as amended by Sec. 105(d) of the Revenue Act of 1942, *supra*, and Sec. 202(c) of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Income Subject to Excess-Profits Tax.*—In the case of any corporation subject to the tax imposed by Subchapter E of Chapter 2, an amount equal to

its adjusted excess-profits net income (as defined in section 710(b)). In the case of any corporation computing such tax under section 721 (relating to abnormalities in income in the taxable period), section 726 (relating to corporations completing contracts under the Merchant Marine Act of 1936), section 731 (relating to corporations engaged in mining strategic minerals), or section 736(b) (relating to corporations with income from long-term contracts), the credit shall be the amount of which the tax imposed by such subchapter is 95 per centum. For the purpose of the preceding sentence the term "tax imposed by Subchapter E of Chapter 2" means the tax computed without regard to the limitation provided in section 710(a)(1)(B) (the 80 per centum limitation), without regard to the credit provided in section 729 (c) and (d) for foreign taxes paid, and without regard to the adjustments provided in section 734. This subsection shall not apply to any corporation exempt from such tax under section 725 or section 727.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 26.)

SEC. 322. REFUNDS AND CREDITS.

(a) [as amended by Sec. 172(e)(1) of the Revenue Act of 1942, *supra*] *Authorization.*—

(1) *Overpayment.*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

* * * * *

(b) *Limitation on Allowance.*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return

was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) [as amended by Sec. 169(a) of the Revenue Act of 1942, *supra*] *Limit on amount of credit or refund.*—The amount of the credit or refund shall not exceed the portion of the tax paid—

(A) If a return was filed by the taxpayer, and the claim was filed within three years from the time the return was filed, during the three years immediately preceding the filing of the claim.

* * * * *

(3) [as added by Sec. 169(a) of the Revenue Act of 1942, *supra*] *Exceptions in the case of waivers.*— * * *

* * * * *

(c) *Effect of Petition to Tax Court.*—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272(a) and if the taxpayer files a petition with The Tax Court of the United States within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Tax Court which has become final; and

* * * * *

(d) [as amended by Sec. 169(b) of the Revenue Act of 1942, *supra*, and Sec. 5(c) of the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517] [3] *Overpayment Found by Tax Court.*— If the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax unless the Tax Court determines as part of its decision (1) that such portion was paid (A) within two years before the filing of the claim, the mailing of the notice of deficiency, or the execution of an agreement by both the Commissioner and the taxpayer pursuant to section 276(b) to extend beyond the time prescribed in section 275 the time within which the Commissioner might assess the tax, whichever is earliest, or (B) within three years before the filing of the claim, the mailing of the notice of deficiency, or the execution of the agreement, whichever is earliest, if the claim was filed, the notice of deficiency mailed, or the agreement executed within three years from the time the return was filed by the taxpayer, or (C) after the execution of such an agreement and before the expiration of the period within which the Commissioner might make an assess-

[3] By Section 5(f) of the Tax Adjustment Act of 1945, *supra*, the amendment made by that Act to Section 322(d) was made applicable to all taxable years beginning after 1940. The amendment to Section 322(d) made by the Revenue Act of 1942, *supra*, was effective for all taxable years beginning after January 1, 1942, and, under certain conditions, even for prior years. See Section 169(c) of the 1942 Act, as amended by Section 509 of the Revenue Act of 1943, *supra*.

ment pursuant to such agreement or any extension thereof, or (D) after the mailing of the notice of deficiency; or (2), if such portion was not paid within the period described in clause (1), but the notice of deficiency was mailed within seven years from the time prescribed for the filing of the return, or a claim described in subsection (b)(5) was filed, that such portion does not exceed the amount of the overpayment attributable to the deductibility of items described in subsection (b)(5); or (3), if such portion was not paid within the period described in clause (1), but the notice of deficiency was mailed within the period prescribed in subsection (b)(6) for the filing of a claim for credit or refund of an overpayment attributable to a carry-back, or such a claim was filed, that such portion does not exceed the amount of the overpayment attributable to a carry-back.

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(26 U.S.C. 1952 ed., Sec. 322.)

CHAPTER 2—ADDITIONAL INCOME TAXES

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SUBCHAPTER E—EXCESS PROFITS TAX

[As added by Sec. 201 of the Second Revenue Act of 1940, *supra*, which provided that the new subchapter may be cited as the "Excess Profits Tax Act of 1940"].

PART I

SEC. 710. IMPOSITION OF TAX.

(a) [as amended by Sec. 201(a) of the Revenue Act of 1941, *supra*, and Sec. 202 of the Revenue Act of 1942, *supra*] *Imposition.*—

(1) *General Rule.*—There shall be levied, collected, and paid, for each taxable year, upon the adjusted excess-profits net income,

as defined in subsection (b), of every corporation (except a corporation exempt under section 727) a tax equal to whichever of the following amounts is the lesser:

(A) [as amended by Sec. 202(a) of the Revenue Act of 1943, *supra*] 95 per centum of the adjusted excess profits net income,[3] or

(B) an amount which when added to the tax imposed for the taxable year under Chapter 1 (other than section 102) equals 80 per centum of the corporation surtax net income, computed under section 15 or Supplement G, as the case may be, but without regard to the credit provided in section 26(e) (relating to income subject to the tax imposed by this subchapter).

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[3] This 95 per cent rate was made applicable only for taxable years beginning after December 31, 1943 (see Section 201 of the 1943 Act). The rate for prior years was 90 per cent (see Section 202 of the 1942 Act).

With respect to fiscal years beginning in 1943 and ending in 1944 (as the taxable year involved in this case), Section 710(a)(6) provided that the tax be prorated at the 90 per cent and 95 per cent rates, respectively, over 1943 and 1944—and the Commissioner's computation of the excess profits tax in this case for the fiscal year ended January 31, 1944 (R. 11-12), reflects this prorating. A similar prorating over 1943 and 1944 was followed in the Commissioner's computation of the income tax for that taxable year (R. 10-11), in keeping with a corresponding prorating requirement prescribed with respect to the income tax by Section 108(b) of the 1943 Act. Both computations also reflect the increase from $5,000 to $10,000 in the amount of the excess profits tax "specific exemption" under Section 710(b)(1) effective after December 31, 1943, under Section 204(a) of the 1943 Act.

(6) [as added by Sec. 203(a) of the Revenue Act of 1943, *supra*] *Taxable years beginning in 1943 and ending in 1944.*—In the case of a taxable year beginning in 1943 and ending in 1944, the tax shall be an amount equal to the sum of—

(A) that portion of a tentative tax, computed as if the law applicable to taxable years beginning on January 1, 1943, were applicable to such taxable year, which the number of days in such taxable year prior to January 1, 1944, bears to the total number of days in such taxable year, plus

(B) that portion of a tentative tax, computed as if the law applicable to taxable years beginning on January 1, 1944, were applicable to such taxable year, which the number of days in such taxable year after December 31, 1943, bears to the total number of days in such taxable year.

(b) [as amended by Sec. 2(a) of the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, and by Sec. 204(a) of the Revenue Act of 1942, *supra*] *Definition of Adjusted Excess Profits Net Income.*—As used in this section, the term "adjusted excess profits net income" in the case of any taxable year means the excess profits net income (as defined in section 711) minus the sum of:

(1) [as amended by Sec. 204(a) of the Revenue Act of 1943, *supra*] *Specific exemption.*—A specific exemption of $10,000;

(2) *Excess profits credit.*—The amount of the excess profits credit allowed under section 712; and

(3) [as amended by Sec. 204(a) of the Revenue Act of 1942, *supra*] *Unused excess profits credit.*—The amount of the unused excess profits credit adjustment for the taxable year, computed in accordance with subsection (c).

* * * * *

(26 U.S.C. 1952 ed., Sec. 710.)

SEC. 711. EXCESS PROFITS NET INCOME.

(a) *Taxable Years Beginning After December 31, 1939.*—The excess profits net income for any taxable year beginning after December 31, 1939, shall be the normal-tax net income, as defined in section 13(a)(2), for such year except that the following adjustments shall be made:

(1) *Excess profits credit computed under income credit.*—If the excess profits credit is computed under section 713, the adjustments shall be as follows:

(A) [as amended by Sec. 206(a) of the Revenue Act of 1942, *supra*] *Income Subject to Excess Profits Tax.*—In computing such normal-tax net income the credit provided in section 26(e) (relating to income subject to the tax imposed by this subchapter) shall not be allowed;

* * * * *

(2) *Excess profits credit computed under invested capital credit.*—If the excess profits credit is computed under section 714, the adjustments shall be as follows:

* * * * *

(C) [as amended by Sec. 206(a)(2) of the Revenue Act of 1942, *supra*] *Income Subject to Excess Profits Tax.*—In computing such normal-tax net income the credit provided in section 26(e) (relating to income subject to the tax imposed by this subchapter) shall not be allowed;

* * * * *

(26 U.S.C. 1952 ed., Sec. 711.)

SUBTITLE D—GENERAL ADMINISTRATIVE PROVISIONS

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CHAPTER 38—MISCELLANEOUS PROVISIONS

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SEC. 3801. MITIGATION OF EFFECT OF LIMITATION AND OTHER PROVISIONS IN INCOME TAX CASES.

* * * * *

(d) [as amended by Sec. 14(b) of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231 *] *Ascertainment of Amount of Adjustment.*—In computing the amount of an adjustment under this section there shall first be ascertained the tax previously determined for the taxable year with respect to which the error was made. The amount of the tax previously determined shall be the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return (determined as provided in section 271(b)(1) and (3)), if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in section 271(b)(2), made.

There shall then be ascertained the increase or decrease in the tax previously determined which results solely from the correct exclusion, inclu-

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*Section 14(e) of the Individual Income Tax Act of 1944, insofar as material to this amendment, stated:

(e) *Taxable Years to Which Applicable.*—* * * The amendment made by subsection (b) to section 3801(d) of the Internal Revenue Code shall, for the purposes of such section and sections 124, 130, and 3807 of such Code, be applicable in the determination of a tax previously determined only if such tax is for a taxable year beginning after December 31, 1942. * * *

sion, allowance, disallowance, recognition, or non-recognition, of the item, inclusion, deduction, credit, gain, or loss, which was the subject of the error. The amount so ascertained (together with any amounts wrongfully collected, as additions to the tax or interest, as a result of such error) shall be the amount of the adjustment under this section.

* * * * *

(26 U.S.C. 1952 ed., Sec. 3801.)

SEC. 3807 [as added by Sec. 513(a) of the Revenue Act of 1943, *supra*[5]] PERIOD OF LIMITATIONS IN CASE OF RELATED TAXES UNDER CHAPTER 1 AND CHAPTER 2.

(a) *Definitions.*—As used in this section—

(1) The term "tax previously determined" shall have the meaning assigned to such term by section 3801(d).

(2) The term "the same taxable year" shall include any taxable year which coincides in whole or in part with the taxable year for which the determination referred to in subsection (b) is made.

(b) *Extension of Period of Limitations.*—If—

(1) under a determination in respect of a tax imposed by Chapter 1 or Chapter 2, a deficiency is assessed or a credit or refund of an overpayment is allowed, within the period of limitations properly applicable thereto, and

(2) the application of the law or facts determined in the ascertainment of such deficiency or overpayment to any other such tax of the taxpayer under Chapter 1 or Chapter 2 for the same taxable year would result in an increase or decrease in the

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[5] By Section 513(b) of the 1943 Act, Section 3807 was made applicable to all taxable years beginning after December 31, 1939.

amount of the tax previously determined in respect of such other tax, and

(3) on any date prior to the expiration of one year from the assessment of a deficiency or the allowance of a credit or refund in respect of the tax referred to in paragraph (1), the assessment of a deficiency or the allowance of a credit or refund in respect of the tax referred to in paragraph (2) is prevented (except for the provisions of section 3801 or 734) by the operation (whether before, on, or after the date of enactment of the Revenue Act of 1943) of any law or rule of law other than this section and other than section 3761 (relating to compromises),

then upon such date the increase or decease in the tax referred to in paragraph (2) shall be considered a deficiency or an overpayment, as the case may be. Such deficiency may be assessed and collected or such overpayment may be credited or refunded as if on the date the deficiency is assessed or the credit or refund allowed in respect of the tax referred to in paragraph (1) one year remained before the expiration of the periods of limitation upon assessment or filing claim for refund in respect of the tax referred to in paragraph (2) for the same taxable year.

(c) *Adjustment Unaffected by Other Items, Etc.*—In determining whether an increase or decrease in the amount of the tax previously determined shall be considered to result from the application of the law or facts under a determination referred to in subsection (b)(1) changes shall be made in items which are the subject of such determination and in items which are affected thereby, and in no others. The amount which may be assessed or allowed as a credit or refund under subsection (b) shall not be diminished by any credit or set-off based upon any item which was not the sub-

ject of such determination or affected thereby. Such amount, if paid, shall not be recovered by a claim or suit for refund or suit for erroneous refund based upon any item which was not the subject of such determination or affected thereby, except in connection with a subsequent application of this section.

(d) *Application to Affiliated Groups.*—As used in subsection (b) the term "any other such tax of the taxpayer" shall, if the taxpayer was a member of an affiliated group, also include any other such tax of any other member of the group.

(26 U.S.C. 1952 ed., Sec. 3807.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 509

AMBASSADOR HOTEL COMPANY OF LOS ANGELES

COMMISSIONER OF INTERNAL REVENUE

Reply Brief for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 509

AMBASSADOR HOTEL COMPANY OF LOS ANGELES,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply Brief for Petitioner

On page 8 of his brief in opposition, respondent is reduced to arguing a decision in the Tax Court finding an overpayment is "the legal equivalent of an order allowing the refund."

This vague and nebulous argument overlooks that Section 6407 of the Internal Revenue Code of 1954 specifically defines when a refund is allowed and also the Code (Section 6402) itself contains the only authority to allow a refund and it is not given to the Tax Court, as this Court itself has clearly said in the quotation set forth on page 5 of the Petition.

The attempt on page 10 to avoid the plain, blunt statement in this Court's decision that the Tax Court cannot order a refund is completely untenable.

It is obvious that if the Tax Court's decision starts the one year period as the court below holds, many assessments have been made too late in reliance on the regulation quoted on page 7 of the Petition and the attempt to distinguish it at page 10 in the brief in opposition is a lame one.

Of course the reading of Section 3807 (p. 24, resp. br.) leaves no doubt the assessment may be made thereunder within one year after an allowance of a credit or refund which is allowed only if the conditions stated in paragraphs (2) and (3) thereof exist, and, as pointed out at page 8 of our Petition, they certainly do not exist here.

Respectfully submitted,

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Dated: December 9, 1960.